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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 119

O'NEAL MASSEY,

Petitioner,

v.

H. E. MOORE, Warden, Texas State Penitentiary at Huntsville, Texas

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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INDEX

	Page
Opinions Below	2
Jurisdiction	2
Statutes Involved	2
Question Presented	3
Statement	3
1. The Facts	3
2. Prior Judicial Proceedings	5
3. Proceedings in the Federal Courts Below	7
Summary of Argument	7
Argument	8
Conclusion	17

Citations

Cases:

Allen v. *State*, 148 Tex. Cr. R. 1, 184 S.W. 2d 470 (1945)	15
Ashley v. *Pescor*, 147 F. 2d 318 (8th Cir. 1945)	10
Aughton v. *State*, 149 Tex. Cr. R. 504, 196 S.W. 2d 642 (1946)	14
Betts v. *Brady*, 316 U.S. 455 (1942)	8, 9, 14
Ex parte Brown, 145 Tex. Cr. R. 39, 165 S.W. 2d 718 (1942)	16
Busby v. *State*, 143 Tex. Cr. R. 72, 157 S.W. 2d 394 (1941)	12
Bute v. *Illinois*, 333 U.S. 640 (1948)	9
Carter v. *Illinois*, 329 U.S. 173 (1946)	9
Clark v. *State*, 134 Tex. Cr. R. 427, 115 S. W. 2d 953 (1938)	14
Darr v. *Burford*, 339 U.S. 200 (1950)	7
De Meerleer v. *Michigan*, 329 U.S. 663 (1947)	9, 13, 14
Ellis v. *State*, 134 Tex. Cr. R. 346, 115 S.W. 2d 660 (1938)	15
Foster v. *Illinois*, 332 U. S. 134 (1947)	13
Galloway v. *State*, 126 Tex. Cr. R. 294, 71 S.W. 2d 871 (1934)	14
Gammill v. *State*, 135 Tex. Cr. 52, 117 S.W. 2d 790 (1938)	15

Page

Gibbs v. *Burke*, 337 U.S. 773 (1949) 9, 13, 14
Glasser v. *United States*, 315 U.S. 60 (1942) 11
Harrison v. *State*, 145 Tex. Cr. R. 386, 168 S.W. 2d 243 (1943) 15
Hawk v. *Olson*, 326 U.S. 271 (1945) 9, 11
House v. *Mayo*, 324 U.S. 42 (1945) 9
King v. *State*, 151 Tex. Cr. R. 126, 205 S.W. 2d 786 (1947) 12
Ex parte Massey, 157 Tex. Cr. R. 491, 249 S.W. 2d 599 (1952) 6, 17
Ex parte McCune, 156 Tex. Cr. R. 213, 246 S.W. 2d 171 (1952) 16
Mullins v. *State*, 140 Tex. Cr. R. 261, 144 S.W. 2d 565 (1940) 15
Palmer v. *Ashe*, 342 U. S. 134 (1951) 9, 13
Powell v. *Alabama*, 287 U.S. 45 (1932) 10
Reasoner v. *State*, 147 Tex. Cr. R. 114, 178 S.W. 2d 861 (1944) 12
Rice v. *Olson*, 324 U.S. 786 (1945) 9, 12
Ex parte Seymour, 137 Tex. Cr. R. 103, 128 S.W. 2d 46 (1939) 16
Smith v. *O'Grady*, 312 U.S. 329 (1941) 9, 16
Square v. *State*, 142 Tex. Cr. R. 493, 154 S.W. 2d 852 (1941) 15
Stover v. *State*, 145 Tex. Cr. R. 426, 168 S.W. 2d 871 (1943) 15
Tomkins v. *Missouri*, 323 U.S. 485 (1945) 9
Uveges v. *Pennsylvania*, 335 U.S. 437 (1948) 9, 13, 16
Wade v. *Mayo*, 334 U.S. 672 (1948) 9
White v. *Ragen*, 324 U.S. 760 (1945) 7, 9
Williams v. *Kaiser*, 323 U.S. 471 (1945) 9, 11, 13, 14, 15

Statutes:

Texas Revised Civil Statutes:
Art. 199 2, 5, 18
Texas Penal Code:
Art. 34 2, 11, 18
Art. 63 2, 13, 15, 18
Texas Code of Criminal Procedure:
Art. 119 2, 6, 18

	Page
Art. 211	2, 12, 18
Art. 755	2, 12, 18
Art. 762	3, 12, 19
Art. 768	3, 12, 19
Art. 773	3, 12, 19
Art. 826	3, 5, 19

Miscellaneous:

4 Blackstone Commentaries 24 10

SUPREME COURT OF THE UNITED STATES

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No. 119

O'NEAL MASSEY,

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v.

H. E. MOORE, WARDEN, TEXAS STATE PENITENTIARY AT HUNTSVILLE, TEXAS

BRIEF FOR PETITIONER

Petitioner, O'Neal Massey, a prisoner in the Texas State Penitentiary under a sentence of life imprisonment imposed by a Texas court, brought this petition for a writ of habeas corpus in the United States District Court for the Southern District of Texas, Houston Division, claiming a violation of his right to due process of law under the Fourteenth Amendment in that he was tried, convicted and sentenced at a time when he was of unsound mind and unassisted by counsel. The District Court denied the petition without a hearing. The Court of Appeals for the Fifth Circuit, by a divided court, affirmed. This Court granted certiorari. The petitioner prays that the judgment of the Court of Appeals for the Fifth Circuit be reversed and the cause remanded to the District Court for a hearing on the question

of whether petitioner's mental condition at the time of his conviction was such that his trial without counsel accorded him due process of law in compliance with the Fourteenth Amendment.

Opinions Below

The order of the District Court denying the petition for a writ of habeas corpus (R. 44) is not reported. The opinion of the Court of Appeals affirming this order is reported at 205 F. 2d 665 (R. 46).

Jurisdiction

The judgment of the Court of Appeals was entered on June 26, 1953 (R. 62). A petition for rehearing was denied on September 10, 1953 (R. 62). A petition for certiorari was filed in this Court on December 8, 1953. This Court granted certiorari on June 7, 1954 (R. 62). 347 U. S. 1011.

The jurisdiction of this Court rests upon 28 U. S. C. Sec. 1254(1).

Statutes Involved

The relevant provisions of the following Texas statutes are set forth in the Appendix, *infra*, pp. 18-19.

Texas Revised Civil Statutes
Art. 199: 1 Rev. Civ. Stat. (1925) 77, 80; 1 Vernon's Tex. Stat. (1948) 101, 104-105.

Texas Penal Code
Art. 34: 1 Rev. Crim. Stat. (1925) (P. C.) 7; 2 Vernon's Tex. Stat. (1948) 3.
Art. 63: 1 Rev. Crim. Stat. (1925) (P. C.) 11; 2 Vernon's Tex. Stat. (1948) 4.

Texas Code of Criminal Procedure
Art 119: Tex. Laws 1943, c. 233, § 1, p. 354; 2 Vernon's Tex. Stat. (1948) 392.
Art. 211: 1 Rev. Crim. Stat. (1925) (C. C. P.) 33; 2 Vernon's Tex. Stat. (1948) 398.
Art 755: Tex. Laws 1935, c. 308, § 1, p. 714; 2 Vernon's Tex. Stat. (1948) 436.

Art. 762: 1 Rev. Crim. Stat. (1925) (C. C. P.) 118; 2 Vernon's Tex. Stat. (1948) 437.
Art. 768: Tex. Laws 1941, c. 133, § 1, p. 193; 2 Vernon's Tex. Stat. (1948) 438.
Art 773: 1 Rev. Crim. Stat. (1925) (C. C. P.) 119-120; 2 Vernon's Tex. Stat. (1948) 439.
Art 826: 1 Rev. Crim. Stat. (1925) (C. C. P.) 131; 2 Vernon's Tex. Stat. (1948) 449.

Question Presented

When a person of unsound mind is confronted in a state court with a serious criminal charge presenting complex questions of law, including that of pleading and litigating the issue of his own insanity, is he accorded his right to a fair trial, guaranteed by the Fourteenth Amendment, when he is tried, convicted, and sentenced to life imprisonment without being afforded any assistance from counsel?

Statement

1. *The Facts*

On March 11, 1941, petitioner was tried and convicted in the District Court of San Jacinto County, Texas, on a charge of robbery by assault; it is from this trial that the Federal question presented here arises. The circumstances surrounding this trial were as follows:

For two years prior to the trial petitioner had been confined in the Texas Prison System, pursuant to a prior conviction. Several months before the trial his mental condition was found to be so abnormal that he was transferred to the State Prison Psychopathic Hospital, an institution for the insane (R. 30, 32; Tr. 51, 52, 56, 57).[1] During his

[1] Since petitioner's basic claim that he was of unsound mind at the time of trial must be taken as true in these proceedings (see p. 9 *infra*), evidence in the original transcript of the record relating to the events preceding and following the 1941 trial will not be determinative of the question presented for review. In order to minimize public printing costs,

hospital confinement before the trial his behavior became violent (R. 34, 36), and he was accordingly confined in a cell block known as "Nine Row" which at that time was used for the confinement of the most violent inmates of the Prison Psychopathic Hospital (R. 30, 31; Tr. 52, 57).

On March 7, 1941, petitioner was removed from the strait jacket in which he was then confined and delivered into the custody of county officials for trial (Tr. 56, 57, 94). On March 11, without counsel and without legal preparation of any kind, petitioner was led into the courtroom to stand trial on a charge carrying a mandatory penalty of life imprisonment.[2] (R. 22, 42, 43, 44). The District Attorney offered to recommend a five-year sentence if he would plead guilty (R. 42, 43). He declined to do so and a plea of not guilty was entered (R. 42, 43). Thereafter petitioner took no part in the proceedings; apparently he asked no questions and made no attempt to conduct any defense.[3] The complaining witness, who was the only eye-witness called by the prosecution, has freely admitted that he never saw his assailants, that he could not and did not attempt to identify petitioner as one of them, and that he was not cross-examined at the trial (R. 28). At no time before, during, or after the trial was petitioner represented or in any way assisted by counsel in the criminal proceedings here involved (R. 22, 42, 43, 44). Petitioner was convicted and immediately sentenced to life imprisonment in the pen-

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therefore, a large part of this evidence has been omitted from the printed record; only a portion sufficient to show that petitioner's claim is not frivolous has been printed at public expense. Where the unprinted transcript is cited to clarify the background of the case and more than one number appears on a page of the transcript, the citation in this brief refers to the penciled number in the lower right-hand corner of the page.

[2] See n. 14, p. 13 *infra*.

[3] See the opinion of Judge Rives of the Court of Appeals for the Fifth Circuit, 295 F. 2d at 674 (R. 58-59). The transcript of the trial is not a part of the record in this proceeding, but if it is deemed necessary respondent may be able to furnish it.

itentiary (R. 6, 40).[4] All of these proceedings took place on the same day, March 11, 1941 (R. 6, 13, 40, 42, 43; Tr. 84-85).

That afternoon, shortly after being sentenced, he slashed his wrists with a razor (R. 15, 34, 39), but his attempted suicide failed; a few hours later on the same day, when the flow of blood had been stopped by hospital treatment, he was returned to the penitentiary (R. 34, 40), and he was promptly recommitted to the Psychopathic Ward and "Nine Row" (R. 34). Because his behavior continued to be abnormal and "vicious" (R. 35, 36), his confinement in the prison insane asylum continued for several months after the trial (R. 35). Petitioner did not appeal his conviction (R. 6). The time for appeal expired while he was still in the insane asylum (R. 35; Texas Code of Criminal Procedure, Art. 826; Texas Revised Civil Statutes, Art. 199).

2. *Prior Judicial Proceedings*

For ten years prior to these proceedings petitioner had attempted by habeas corpus proceedings in the state and Federal courts to obtain judicial consideration of the legality of his detention, claiming that it was illegal because he was tried and convicted without counsel when he was insane and unable to defend himself. Until 1952 he failed because the record of his trial erroneously stated that he was represented by counsel.[5] Ultimately the trial judge and prosecuting attorney both supplied affidavits stating that the record was in error and that at no time had petitioner had the benefit of counsel (R. 42, 43). In 1952 these affida-

[4] Through an oversight the actual sentence, though apparently pronounced in court, was not entered on the proper court records at the conclusion of the trial. This error was rectified by judgment nunc pro tunc rendered July 26, 1945 (R. 17; Tr. 84-85).

[5] The history of petitioner's various habeas corpus proceedings prior to 1952 is set out at R. 6-10, 15-18, 46, 52-54.

vits were presented to the Federal District Court in support of a new petition for a writ of habeas corpus. In denying his petition and motion for rehearing, the District Judge held that the appearance of these affidavits raised a new Federal constitutional question which had never been considered by the courts of Texas. He therefore declined to entertain petitioner's claim at that time on the ground that the latter's state remedies, if any, had not as yet been exhausted (R. 20, 22).

Accordingly petitioner applied for a writ of habeas corpus to the District Court of Walker County, Texas. There a hearing was held on April 4, 1952 (Tr. 40), but in accordance with the Texas Code of Criminal Procedure, Art. 119, the District Court made no findings and certified the case to the Court of Criminal Appeals with a transcript of the evidence, pleadings, and orders. Without considering any of the evidence presented below, the Court of Criminal Appeals denied relief on the ground that, although petitioner had not been assisted by counsel at his trial, an allegation of insanity as one of the circumstances bearing on a defendant's right to counsel under the Fourteenth Amendment can be heard in the Texas courts only if it is raised on appeal before the conviction has become final; it cannot be heard on collateral attack. *Ex Parte Massey*, 157 Tex. Cr. R. 491, 496, 249 S. W. 2d 599, 601 (1952).

The decision of the state court of last resort thus rested upon an adequate state ground (the lack of an appropriate remedy).[6] There was therefore no Federal question which could be presented to this Court on petition for certiorari.

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[6] There is no dispute as to the ground upon which the state decision rested. The respondent has emphasized in his Brief in Opposition to the Petition for Certiorari that the Court of Criminal Appeals disposed of the case "solely upon the ground that the [Federal] questions presented to the Court were not properly raised in accordance with State procedure" by appeal from the original conviction. Res. Br. in Opp., pp. 15-16, 23.

Accordingly, without burdening this Court with a matter over which it "would lack jurisdiction," petitioner, having established that no state remedy was available to him, thereupon brought this habeas corpus proceeding in the Federal District Court. *White* v. *Ragen*, 324 U. S. 760, 765 (1945), quoted with approval in *Darr* v. *Burford*, 339 U. S. 200, 209, 210 note 29 (1950).

3. *Proceedings in the Federal Courts Below*

Both the District Court and the Court of Appeals for the Fifth Circuit denied the petition for habeas corpus for failure to state a claim warranting relief. The opinion of the District Court does not discuss the reasons for its holding. The Court of Appeals in substance held (1) that, despite the fact that petitioner was not assisted by counsel at the trial, the question of insanity should have been raised at that time or on appeal, and that petitioner should not now have an opportunity to "retry" the issue (205 F. 2d at 667, 668; R. 49, 50); (2) that allegations of insanity and lack of counsel are insufficient to raise a substantial Federal question in the absence of an allegation that the State, in addition to prosecuting, perpetrated some further "unfairness" in the course of the proceedings involved. 205 F. 2d at 668, 669 (R. 49, 50, 51).

Summary of Argument

Since the petition for habeas corpus was denied below for failure to state a claim warranting relief, it must be assumed for the purposes of this proceeding that petitioner was mentally incapable of conducting his own defense without counsel at the trial complained of here.

That proceeding, like any other trial on a felony charge, presented complex questions of law with which no layman, sane or insane, could be expected to cope without the assist-

ance of counsel. The trial of this insane layman, therefore, did not comply with the due process standards of fairness repeatedly pronounced by this Court.

Since petitioner has never had an opportunity to litigate the question of his mental condition at the time of the trial, and since the presence or absence of affirmative misconduct on the part of the State at the trial is irrelevant, the court below erred in denying petitioner a hearing on his claim, and its judgment must be reversed.

ARGUMENT

In the last analysis the question which this Court is called upon to decide is this: whether an American citizen may be deprived of his liberty for life in an *ex parte* proceeding without being afforded a chance to say a rational word in his own defense. The answer, of course, is plain: the action taken by the State of Texas against this petitioner on March 11, 1941, is "offensive to the common and fundamental ideas of fairness and right" and violated the Fourteenth Amendment. *Betts* v. *Brady*, 316 U. S. 455, 473 (1942).

It may be suggested that it is an exaggeration to characterize the trial complained of here as an *ex parte* proceeding, for respondent may well argue, as he has in the past, that petitioner was not actually insane at the time of trial and was therefore capable of conducting his own defense without the assistance of counsel. But such an argument is completely beside the point. Petitioner alleged below that he was of unsound mind (R. 1, 4),[7] and his peti-

[7] Petitioner's allegation is not frivolous. In 1948 the United States District Court made the following findings:

> "I find petitioner to have been at times and from time to time of unsound mind around March 11, 1941, the date of his trial in the District Court of San Jacinto County, and for several months previous thereto, and several months subsequent thereto. What his condition was on the day and at the time of the trial is not clear. I think he is

tion was denied without a hearing for failure to state a claim warranting relief. His allegation of mental incapacity, therefore, as well as his unchallenged allegation of lack of counsel, must be taken as true in these proceedings. *White* v. *Ragen*, 324 U. S. 760, 763 (1945); *House* v. *Mayo*, 324 U. S. 42, 45 (1945); *Williams* v. *Kaiser*, 323 U. S. 471, 473, 474 (1945). Until this Court orders a hearing on the question of petitioner's mental capacity to conduct his own defense at the trial, it must be assumed that he was totally incapable of making any defense against the serious charges of the State.

In view of this complete incapacity and the admitted absence of counsel, the conclusion is inescapable that the courts below erred in denying petitioner's claim without a hearing. Numerous decisions of this Court make it perfectly clear that if a sane but ignorant layman is tried in a state court without counsel on a serious criminal charge, his inability to comprehend the legal issues before him will invalidate his conviction. See *Palmer* v. *Ashe*, 342 U. S. 134 (1951); *Gibbs* v. *Burke*, 337 U. S. 773, 780 (1949); *Uveges* v. *Pennsylvania*, 335 U. S. 437 (1948); *Wade* v. *Mayo*, 334 U. S. 672 (1948); *De Meerleer* v. *Michigan*, 329 U. S. 663 (1947); *Rice* v. *Olson*, 324 U. S. 786 (1945); *Smith* v. *O'Grady*, 312 U. S. 329 (1941).[8] Now for the first time this Court is asked to rule on the validity of a conviction

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now sane, but rather queer." (R. 15, quoted in 205 F. 2d 665, 673, R. 56).

The District Court in those proceedings made no finding as to petitioner's mental condition "on the day and at the time of the trial" simply because it did not believe such a finding to be necessary; the court was proceeding upon the erroneous assumption that petitioner had been represented by counsel at the trial (R. 13-14, 18). See p. 5 *supra*.

[8] See also *Bute* v. *Illinois*, 333 U. S. 640, 671 (1948); *Carter* v. *Illinois*, 329 U. S. 173, 179 (1946); *Hawk* v. *Olson*, 326 U. S. 271 (1945); *Tomkins* v. *Missouri*, 323 U. S. 485 (1945); *Williams* v. *Kaiser*, 323 U. S. 471 (1945); *Betts* v. *Brady*, 316 U. S. 455, 472 (1942).

without counsel of a person who was not only unskilled in the law but was also actually deranged at the time of trial. The proper result follows directly from the decisions cited above: the conviction of a man who was "physically present but mentally absent" from the courtroom cannot be allowed to stand against the clear import of the Fourteenth Amendment and the basic traditions of Anglo-American law. See *Ashley* v. *Pescor*, 147 F. 2d 318, 319 (8th Cir. 1945).[9]

The conviction should be struck down, moreover, without requiring petitioner to show specifically that he was prejudiced at the trial by his mental incapacity. As this Court said in *Powell* v. *Alabama*, 287 U. S. 45, 68-69 (1932),

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted

[9] The cited case quotes from 4 Blackstone Commentaries 24, which reads as follows:

> "Also if a man in his sound memory commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried: for how can he make his defence? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of non-sane memory, execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution. Indeed, in the bloody reign of Henry the Eighth, a statute was made, which enacted that if a person, being *compos mentis*, should commit high treason, and after fall into madness, he might be tried in his absence, and should suffer death, as if he were of perfect memory. But this savage and inhuman law was repealed by the statute 1 and 2 P. and M., c. 10." (Footnotes omitted).

> upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. *If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.*" (Emphasis supplied).

Criminal law and procedure being what they are, it must be presumed as a matter of law that any trial on a felony charge necessarily involves legal complexities with which an insane man is unable to cope unless he has the assistance of counsel.[10]

The record in these proceedings is in itself sufficient proof of the validity of the foregoing presumption. Set forth below are six of the more obvious legal considerations with which this helpless man was confronted at his 1941 trial.[11]

(1) Article 34 of the Texas Penal Code provides:

> "No person who becomes insane after he committed an offense shall be tried for the same while in such condition."

If the provision had been invoked by counsel, the trial complained of here could not have taken place at all.

Furthermore, even if the conviction had been valid, petitioner could not have been sentenced, for Texas law pro-

[10] This Court has often refused to speculate as to the degree of prejudice resulting from the lack of the assistance of counsel. See, *e. g.*, *Hawk* v. *Olson*, 326 U. S. 271, 278 (1945); *Williams* v. *Kaiser*, 323 U. S. 471, 475 (1945); *Glasser* v. *United States*, 315 U. S. 60, 75-76 (1942).

[11] As mentioned above, all of the following points are based upon the record before this Court. What additional arguments might be derived from the trial record it is, of course, impossible to say. See n. 3, p. 4, *supra*.

hibits *any* sentence from being imposed after a felony conviction if the defendant is insane. Texas Code of Criminal Procedure, Art. 773.[12]

(2) It appears that venue was improperly laid in San Jacinto County. The attack upon the complaining witness and the taking of his property occurred at the Eastham Prison Farm (R. 27, 28), which is located in Houston County. Hence the crime would probably be deemed under Texas law to have been "completed" in that county for the purposes of venue. See *Busby* v. *State*, 143 Tex. Cr. R. 72, 75, 157 S.W. 2d 394, 396 (1941). If so, then under Art. 211, Texas Code of Criminal Procedure, venue could have been laid only in Houston County, and this conviction would have been reversed on appeal. See, *e.g.*, *King* v. *State*, 151 Tex. Cr. R. 126, 205 S.W. 2d 786 (1947); *cf. Reasoner* v. *State*, 147 Tex. Cr. R. 114, 178 S.W. 2d 861 (1944). This Court in the past has given great weight to the difficulties which similar technical problems present even to the layman whose sanity is unquestioned. See, *e.g.*, *Rice* v. *Olson*, 324 U. S. 786 (1945).

(3) Counsel, if present, might well have advised petitioner not to plead to the charge as he did. When he was brought into the courtroom for trial, petitioner was offered a chance to plead guilty in return for a recommendation of a five-year sentence (R. 42, 43).[13] From the wording of the indictment it would have been clear to a lawyer that a refusal of the offer followed by conviction would necessarily

[12] The record shows that sentence was imposed on the same day that petitioner was convicted (R. 6, 13, 40), thus violating Texas Code of Criminal Procedure, Art. 768, which, in conjunction with Arts. 755 and 762, in effect provides that sentence in felony cases shall be pronounced not less than two days after conviction.

[13] The record indicates that the recommendation would have been accepted. On the preceding day, one Jack Cade stood trial in the same court on the charge of the same alleged robbery. A similar offer made to Cade

result in a life sentence.[14] If petitioner's innocence would have been difficult to establish, a skillful assessment of the case might well have indicated that a plea of guilty was the wiser course. *Cf. De Meerleer* v. *Michigan*, 329 U. S. 663 (1947); *Palmer* v. *Ashe*, 342 U. S. 134 (1951); *Uveges* v. *Pennsylvania*, 335 U. S. 437 (1948). See also *Foster* v. *Illinois*, 332 U. S. 134 (1947). As this Court said in *Williams* v. *Kaiser*, 323 U. S. 471, 475 (1945), "Only counsel could discern from the facts whether a plea of not guilty to the offense charged or a plea of guilty to a lesser offense would be appropriate." [15]

(4) Apparently petitioner introduced no evidence in his own defense.[16] The effect of his mental inability to do so, however, would have been largely overcome if counsel had been present. Furthermore, even if no affirmative evidence had been available, the inherent weakness of the evidence offered by the prosecution, quite aside from questions of admissibility, indicates the ease with which a reasonable doubt as to the petitioner's guilt might have been raised in the jury's mind by cross-examination or by proper summation.

As mentioned earlier, the one and only eye-witness called by the prosecution never saw the offenders, and he did not identify the petitioner as being in any way connected with the crime. The defense of mistaken identity was obviously

[14] The indictment charged, in addition to the basic crime of robbery by assault, that petitioner had suffered two prior felony convictions (R. 41-42). The purpose of the charge was to invoke the so-called Habitual Criminal Statute, Texas Penal Code, Art. 63, which provides that, upon a third conviction for a felony less than capital, a life sentence in the penitentiary shall be imposed (see R. 13).

[15] In *Gibbs* v. *Burke*, 337 U. S. 773, 781 (1949), the Court said:

> "A defendant who pleads not guilty and elects to go to trial is usually more in need of the assistance of a lawyer than is one who pleads guilty."

indicated by this inadequacy in the prosecution's case; yet the witness was not even cross-examined (R. 28). It seems fairly clear that the probative value of this and other evidence might well have crumbled at a lawyer's touch. Where the accused himself does not have the ability to cope with such evidentiary problems, this Court has consistently emphasized the need for the assistance of counsel. *E.g., Gibbs* v. *Burke*, 337 U. S. 773, (1949); *De Meerleer* v. *Michigan*, 329 U. S. 663 (1947); *Williams* v. *Kaiser*, 323 U. S. 471 (1945); *cf. Betts* v. *Brady*, 316 U. S. 455 (1942).

(5) Among the facts which the State must prove beyond a reasonable doubt in a Texas prosecution for robbery by assault is that the accused intended at the time of taking "to *permanently* appropriate" the property to his own use; if the purpose was to use the property only temporarily, the offense, if any, is not robbery. *Galloway* v. *State*, 126 Tex. Cr. R. 294, 296, 71 S.W. 2d 871 (1934); *Clark* v. *State*, 134 Tex. Cr. R. 427, 428, 115 S.W. 2d 953, 954 (1938) (emphasis supplied); *cf. Aughton* v. *State*, 149 Tex. Cr. R. 504, 196 S.W. 2d 642 (1946).

Petitioner here was apparently believed to have taken a car for the purpose of effectuating an escape from prison. It is reasonable to suppose that in that event petitioner would not have intended to appropriate the car permanently. A defense lawyer would as a matter of course have brought out the failure to prove the necessary intent, but without a lawyer such available defenses were lost before the trial began.

In discussing such questions of state criminal law, this Court has observed that:

> "These involve technical requirements of the indictment or information, the kind of evidence required for conviction, the instructions necessary to define the several elements of the crime, and the various defenses which are available. These are a closed book to the

average layman." *Williams* v. *Kaiser*, 323 U. S. 471, 474-475 (1945).

The book is also closed to the insane layman.

(6) As noted above,[17] the indictment was drawn with a view to invoking the Texas "Habitual Criminal Statute," Texas Penal Code, Art. 63, which makes a life sentence mandatory upon a third felony conviction. In order that a life sentence may be imposed on this ground, however, the indictment must allege that "each succeeding *offense* was committed after conviction of the preceding offense." *Ellis* v. *State*, 134 Tex. Cr. R. 346, 349, 115 S.W. 2d 660, 662 (1938) (emphasis supplied). The instant indictment fails to allege that the second offense was committed after the first conviction (R. 41-42). If appealed, the conviction would have been reversed with instructions to quash the two counts of the indictment upon which this life sentence depends.[18]

Respondent may argue that one or more of the six conclusions set forth above are not so indisputable as counsel for petitioner believe them to be. If such arguments are presented, however, they will not tend to prove in the slightest degree that petitioner's 1941 trial was fair. On the contrary, they will only serve to show that sane lawyers can disagree on the difficult issues of Texas law with which this insane layman was confronted at his trial. Whatever the conclusions of counsel, judge, and jury might have been had they had an opportunity to consider these problems, the very existence of such questions demonstrates petitioner's

[17] See n. 14, p. 13, *supra*.

[18] *Allen* v. *State*, 148 Tex. Cr. R. 1, 184 S. W. 2d 470 (1945); *Harrison* v. *State*, 145 Tex. Cr. R. 386, 168 S. W. 2d 243 (1943); *Stover* v. *State*, 145 Tex. Cr. R. 426, 168 S. W. 2d 871 (1943); *Square* v. *State*, 142 Tex. Cr. R. 493, 154 S. W. 2d 852 (1941); *Mullins* v. *State*, 140 Tex. Cr. R. 261, 144 S. W. 2d 565 (1940); *Gammill* v. *State*, 135 Tex. Cr. R. 52, 117 S. W. 2d 790 (1938); *Ellis* v. *State*, 134 Tex. Cr. R. 346, 115 S. W. 2d 660 (1938).

helplessness before the "intricacies of criminal procedure." *Uveges* v. *Pennsylvania*, 335 U. S. 437, 442 (1948). In requiring a person with such an insuperable handicap, on pain of life imprisonment, to raise and litigate these complex issues in an adversary proceeding against a trained and skillful prosecutor, the State of Texas violated the basic standard of fairness laid down by the Fourteenth Amendment.

It will not do to say, as the Court of Appeals and respondent have said, that petitioner is now attempting to litigate an issue (the issue of insanity) which should have been litigated in the original criminal proceedings. As to litigation at the trial, the argument assumes that petitioner was mentally capable of such action, which by hypothesis he was not. And as for raising the question on direct appeal from the conviction, this Court has refused to impose such a requirement upon a layman who has no counsel, even though he be sane. See *Smith* v. *O'Grady*, 312 U. S. 329 (1941).

Nor will it do to say, as the court below has implied, that the conviction must stand unless petitioner can point to something reprehensible in the conduct of the prosecuting attorney or the trial judge. It may be assumed, arguendo, that these officials did not know of petitioner's incapacity and were thus faultless in the performance of their duties. But the fact remains that, innocently or not, the State put petitioner to trial without counsel at a time when he was helpless; the fact remains that he is now serving a life sentence as a result of a conv tion he could not contest. That conviction, moreover, now being final under Texas law, is totally immune from attack in the Texas courts. See *Ex parte Seymour*, 137 Tex. Cr. R. 103, 128 S. W. 2d 46 (1939); *Ex parte Brown*, 145 Tex. Cr. R. 39, 165 S. W. 2d 718 (1942); *Ex parte McCune*, 156 Tex. Cr. R.

213, 246 S. W. 2d 171 (1952); *Ex parte Massey*, 157 Tex. Cr. R. 491, 249 S. W. 2d 599 (1952).

Petitioner's predicament cries for Federal relief. If his allegation of mental incapacity is untrue, that fact will be readily discovered in a hearing in the Federal District Court. If, on the other hand, his allegation is true, he has clearly been deprived of his liberty without due process of law, and the Federal writ should issue.

Conclusion

Wherefore, petitioner prays that the judgment of the Court of Appeals for the Fifth Circuit be reversed and the cause remanded to the Federal District Court for a hearing on the question of whether petitioner's mental condition on March 11, 1941, was such that his trial without counsel accorded him due process of law.

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APPENDIX

Texas Revised Civil Statutes

Art. 199: * * * " . . . the terms of the district courts in and for said Ninth Judicial District of Texas, shall be begun and holden therein as follows, to-wit:

* * * *

"In the county of San Jacinto on the sixth Monday after the first Monday in January and July and may continue in session for five weeks."

Texas Penal Code

Art. 34: * * * "No person who becomes insane after he committed an offense shall be tried for the same while in such condition." * * *

Art. 63: "Whoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary."

Texas Code of Criminal Procedure

Art. 119: * * * "After final conviction in any felony case the writ [of habeas corpus] must be made returnable to the Court of Criminal Appeals of Texas at Austin, Texas. The writ may issue upon the order of any district judge, and said judge may apon presentation to him of a petition for said writ, set the same down for a hearing as to whether the writ should issue, and ascertain the facts, which facts shall be transmitted to the Court of Criminal Appeals with the return of the writ if same is issued after such hearing." * * *

Art. 211: "If venue is not specifically stated, the proper county for the prosecution of offenses is that in which the offense was committed."

Art. 755: "A new trial must be applied for within two (2) days after the conviction; but for good cause shown, the Court may allow the motion to be made at any time before the adjournment of the term at which the conviction was had. When the Court adjourns before

the expiration of two (2) days after the conviction, the motion shall be made before the adjournment."

Art. 762: "The motion [in arrest of judgment] must be made within two days after the conviction; or if the court adjourns before the expiration of such time, then it may be made at any time before final adjournment for the term."

Art. 768: "If a new trial is not granted, nor judgment arrested in felony cases, the sentence shall be pronounced in the presence of the defendant at any time after the expiration of the time allowed for making the motion for a new trial or the motion in arrest of judgment; . . . "

Art. 773: "Before pronouncing sentence in a case of a felony, the defendant shall be asked whether he has anything to say why the sentence should not be pronounced against him. The only reasons which can be shown, on account of which sentence can not be pronounced, are:

* * * * *

"2. That the defendant is insane; and, if sufficient proof be shown to satisfy the court that the allegation is well founded, no sentence shall be pronounced. Where there is sufficient time left, a jury may be impaneled to try the issue. Where sufficient time does not remain, the court shall order the defendant to be confined safely until the next term of the court, and shall then cause a jury to be impaneled to try such issue." * * *

Art. 826: "An appeal may be taken by the defendant at any time during the term of the court at which the conviction is had."